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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

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7 UNITED STATES OF AMERICA,

8 Plaintiff,

Case No. 2:13-cr-0271-KJD-CWH

Related Case: 2:16-cv-2518-KJD

9 v.

ORDER

10 RICHARD LAWRENCE STROHMETZ,

11 Defendant.

12 Before the Court is Richard L. Strohmets's Motion under 28 U.S.C. § 2255 to Vacate, Set
13 Aside, or Correct Sentence (ECF No. 99) to which the government responded (ECF No. 104).
14 Though the time to do so has passed, Strohmets did not reply.

15 Richard Strohmets is currently serving a 151-month sentence after pleading guilty to six
16 counts of bank robbery under 18 U.S.C. § 2113(a). Strohmets did not appeal his conviction,
17 though it is unclear whether he asked his trial counsel, Dustin Marcello, to file a notice of appeal.
18 Strohmets claims that he instructed Marcello to file a notice of appeal despite the various appeal
19 waivers in Strohmets's plea agreement. There is no record of Strohmets's request, and Marcello
20 cannot recall whether Strohmets asked for help with a direct appeal or with a future habeas
21 petition. This § 2255 petition was born of that uncertainty.

22 Strohmets now moves to vacate his sentence based on Marcello's failure to file his
23 appeal. It is ineffective assistance of counsel for an attorney to disregard a defendant's specific
24 instruction to file an appeal. Where, as here, it is unclear whether the defendant specifically
25 instructed counsel to appeal, the Court has two options. The Court may hold an evidentiary
26 hearing to determine whether the defendant indeed directed counsel to file an appeal. Or, the
27 Court may assume that the defendant intended to appeal and reissue the judgment of conviction
28 to give the defendant a second chance. The government recommends the second option as it

1 would be the easier and faster option. The Court agrees. Accordingly, Strohmets's petition is
2 granted in part. The Court vacates Strohmets's judgment of conviction and reenters judgment as
3 of the date of this order, which restarts the clock for Strohmets to file a notice of appeal.

4 **I. Background**

5 Strohmets was arrested in May of 2013 in connection to a string of bank robberies in
6 Nevada and Washington state. See Superseding Information, ECF No. 79. Between March and
7 April of 2013, Strohmets robbed four bank branches in Washington and one Nevada bank branch
8 twice. Plea Agreement 3–4, ECF No. 81. His method was consistent throughout the robberies.
9 Strohmets would enter the branch and wait for a teller. When he arrived at the teller window,
10 Strohmets would either pass the teller a note demanding “20’s, 50’s, AND 100’s” or verbally
11 demand those bills. Id. at 4. All but one of the tellers complied, and Strohmets took the banks for
12 more than \$25,000. Id. at 3–4. During two of the robberies, Strohmets also carjacked or
13 attempted to carjack bank customers and used one of the vehicles to commit other robberies. Id.

14 Strohmets elected not to go to trial and pleaded guilty to all six counts of bank robbery.
15 Strohmets admitted to facts supporting each of the six robberies. In exchange, he received a two-
16 level downward adjustment for acceptance of responsibility. Id. at 7. The government agreed to
17 recommend a sentence within the guideline range of 151 to 188 months. Id. at 11. The agreement
18 required Strohmets to waive several trial and appellate rights. Important here, Strohmets
19 knowingly and expressly waived “the right to appeal any sentence imposed within or below the
20 applicable Sentencing Guideline range,” and “reserve[d] only the right to appeal any portion of
21 the sentence that is an upward departure or an upward variance from the Sentencing Guideline
22 range determined by the Court.” Id. at 13.

23 Despite the appeal waivers in the plea agreement, Strohmets claims he still intended to
24 challenge the Court’s restitution order for the Washington robberies, the Court’s career offender
25 enhancement at sentencing, and the District of Nevada’s jurisdiction over the Washington-based
26 robberies. See Motion to Vacate 5, ECF No. 99. Strohmets’s trial attorney remembers that
27 Strohmets “did tell him that he wanted to challenge certain rulings,” but he believed “Strohmets
28 to be talking about claims under 28 U.S.C. § 2255.” Govt. Resp. 4 n.3, ECF No. 104. Counsel

1 admits that “it is possible he misunderstood, and that Strohmetz had actually been talking about a
2 direct appeal.” Id. The window for Strohmetz’s appeal closed shortly after his judgment of
3 conviction became final in 2015, and he lost his chance at a direct appeal. This § 2255 petition
4 followed.

5 **II. Legal Standard**

6 A defendant in federal custody may challenge a conviction that “was imposed in
7 violation of the Constitution or laws of the United States” under 28 U.S.C. § 2255(a). However,
8 § 2255 is not intended to give criminal defendants multiple opportunities to challenge their
9 sentences. United States v. Dunham, 767 F.2d 1395, 1397 (9th Cir. 1985). Rather, § 2255 limits
10 relief to cases where a “fundamental defect” in the defendant’s proceedings resulted in a
11 “complete miscarriage of justice.” Davis v. United States, 417 U.S. 333, 346 (1974). The Court
12 may summarily dismiss the petition if it is clear from the record that the petitioner does not state
13 a claim for relief or if the claims are frivolous or palpably incredible. United States v. Burrows,
14 872 F.2d 915, 917 (9th Cir. 1989) (citing Baumann v. United States, 692 F.2d 565, 570–71 (9th
15 Cir. 1982)). As always, the Court construes pro se pleadings liberally and in the petitioner’s
16 favor. Erickson v. Pardus, 551 U.S. 89, 94 (2007). Despite that leeway, the pro se party is still
17 “bound by the rules of procedure.” Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995).

18 **III. Analysis**

19 Strohmetz brings four claims in this § 2255 petition: (1) ineffective assistance of counsel
20 for counsel’s failure to file a notice of appeal; (2) ineffective assistance of counsel for counsel’s
21 failure to challenge the career criminal enhancement at sentencing; (3) a challenge to the Court’s
22 restitution order related to conduct in a foreign district; and (4) a challenge to the Court’s
23 jurisdiction and venue over conduct in a foreign district. Motion to Vacate at 5–9. The
24 government concedes that the Court should grant the petition inasmuch as it seeks the
25 opportunity to file an appeal because there is no way to know whether Strohmetz actually
26 directed trial counsel to file an appeal. Strohmetz’s remaining claims appear to be barred by the
27 appeal waivers in his plea agreement. However, the Court need not reach those claims before his
28 appeal.

1 The Supreme Court is clear that “a lawyer who disregards specific instructions from the
2 defendant to file a notice of appeal acts in a manner that is professionally unreasonable.” Roe v.
3 Flores-Ortega, 528 U.S. 470, 477 (2000). Conversely, representation is not deficient if counsel
4 fails to file an appeal after a client specifically instructs counsel *not* to do so. Id. This is
5 consistent with the fact that the client must be the one to decide whether to pursue an appeal.
6 Jones v. Barnes, 463 U.S. 745, 751 (1983). Those two ends of the spectrum provide clear
7 guidance to trial attorneys representing clients after judgment. The cases that fall in the middle of
8 the spectrum—like this one—are murkier.

9 This case is less clear because it is unknown whether Strohmetz instructed his counsel to
10 file a notice of appeal. Counsel’s failure to file an appeal is understandable. After all, it is
11 entirely possible that Strohmetz knowingly waived his right to appeal the very issues he faults
12 trial counsel for not appealing. The baseline, however, is that an attorney must file a client’s
13 desired appeal if the client directs. This is so even if the client waived all appellate rights and
14 lacks a nonfrivolous basis for a direct appeal. United States v. Sandoval-Lopez, 409 F.3d 1193,
15 1197 (9th Cir. 2005). “As contrary to common sense as it seems,” the client has the right to
16 appeal even if that appeal is contrary to the plea agreement and harmful to the client. Id. 1196–
17 97.

18 Sandoval-Lopez provides some clarity for these situations. There, the Ninth Circuit
19 outlined two options. The Court may order an evidentiary hearing to determine whether the
20 petitioner’s claim is true. Id. at 1198. The hearing would allow parties to call witnesses and
21 present evidence to support their claims. If the petitioner’s claim is credible, the Court vacates
22 and reenters the judgment, which allows the petitioner to file a notice of appeal. Id.
23 Alternatively, the government can consent to vacating and reentering the judgment without a
24 hearing, which also allows the petitioner another chance to appeal. Id. In that scenario, the
25 government and the Court assume, without deciding, that the petitioner’s claim is true to
26 expedite the proceeding. Consenting to vacate the judgment and allowing the petitioner to appeal
27 often requires less work than holding the evidentiary hearing. See id. at 1198.

28 That is the government’s position here. Considering the several appellate waivers in

1 Strohmets's plea agreement, the government consents to vacating the judgment and allowing a
2 direct appeal. It is their belief that the Ninth Circuit will dismiss the appeal and thereby resolve
3 Strohmets's outstanding claims. There being no objection from the government, the Court grants
4 Strohmets's petition as to his first claim for ineffective assistance of counsel. The Court assumes,
5 without deciding, that Strohmets directed trial counsel to file an appeal and that counsel failed to
6 do so. As a result, the Court vacates the judgment against Strohmets and reissues the judgment as
7 of the date of this order. Strohmets may now file a timely notice of appeal.¹

8 Having granted Strohmets's ineffective assistance of counsel claim, the Court now turns
9 to his three remaining claims. The government contends that these claims are barred by the valid
10 appeal waivers in Strohmets's plea agreement. The Court tends to agree as Strohmets
11 "knowingly and expressly waive[d] all collateral challenges, including any claims under 28
12 U.S.C. § 2255, to his conviction, sentence, and the procedure by which the Court adjudicated
13 guilt and imposed sentence." Plea Agreement at 13. The only collateral challenge the plea
14 agreement left available was the non-waivable claim for ineffective assistance of counsel. Id.
15 However, considering Strohmets's remaining claims now is unnecessary as his direct appeal may
16 resolve those claims. Therefore, the Court denies Strohmets's remaining claims without
17 prejudice pending the outcome of his direct appeal.

18 **IV. Conclusion**

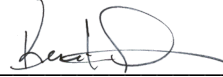
19 Accordingly, IT IS HEREBY ORDERED that defendant Richard Lawrence Strohmets's
20 Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence (ECF No. 99) is
21 **GRANTED IN PART** and **DENIED IN PART**.

22 The Court **GRANTS** the motion as to Strohmets's first ineffective assistance of counsel
23 claim and **VACATES** his judgment of conviction (ECF No. 96). The Clerk of Court is directed
24 to **RE-ENTER JUDGMENT** reflecting the date of entry of this order. Other than the date, all
25 other terms and conditions of Strohmets's judgment shall remain the same.

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28 ¹ Though it is likely unnecessary, the Court urges Strohmets to promptly file his notice of appeal. As he is undoubtedly aware, untimely filing will bar his chance at a direct appeal.

1 The Court **DENIES** without prejudice Strohmetz's remaining claims pending the
2 outcome of his direct appeal.

3 Dated this 19th day of March, 2020.

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7 Kent J. Dawson
8 United States District Judge
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